IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Office-Supreme Court, U.S.
FILED
JUN 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6604

ORIGINAL COPY

DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

W. DAVIS HEWITT
Assistant Attorney General
Counsel of Record for
Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

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The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of decisions by the Supreme Court of Georgia in this case. These decisions are recorded as Thomas v. State, 245 Ga. 688 (1980) decided April 23, 1980 and the addendum thereto 247 Ga. 233 (1981) decided March 3, 1981. These decisions are contained in the appendix to the petition.

QUESTIONS PRESENTED

1. Did the Supreme Court of Georgia in affirming the imposition of the death penalty in the instant case apply Ga. Code Ann. §27-2534.1(b)(7) in a constitutional manner?

2. Did the Supreme Court of Georgia employ the proper procedure on remand from this Court and properly reaffirm Petitioner's death sentence in light of Godfrey v. Georgia, 446 U.S. 100 S.Ct. 1759 (1980)?

3. Was the trial court constitutionally required to provide the Petitioner with an evidentiary hearing on the issue of capacity to stand trial under the circumstances of the instant case?

4. Was the jury selected under the principles contained in Witherspoon v. Illinois, 391 U.S. 511 (1968)?

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PART ONE

STATEMENT OF THE CASE

Donald Wayne Thomas, Petitioner, was indicted in Fulton County in May, 1979, for the murder of Dewey Baugus. (R. 1-2).[1] Following the first psychiatric examination, Petitioner was found on June 1, 1979 not competent to stand trial. (R. 8-11). However, after a later examination, Dr. Jose M. Delatorre of Central State Hospital informed the Court on September 24, 1979, that Petitioner was able to distinguish right from wrong, and had not been acting under the influence of a compulsive delusion and was competent to stand trial. (R. 16-17). Following a jury trial, Petitioner was found guilty and was sentenced to the death penalty. (R. 119-120).

On April 19, 1979, the partially decomposed body of nine-year-old Dewey Baugus was found in the bushes near some railroad tracks in Atlanta. (T. 345-346, 411-417). Young Baugus had last been seen alive several days earlier by a playmate when they went to a ball field together. (T. 460-461).

An autopsy performed by Dr. Saleh Zaki showed that the victim had sustained abrasions and bruises on the neck extending to the larynx and upper chest, and a hemorrhage in the left eye. (T. 433-434). Bruises were also discovered on the head and there were fine hemorrhages in the coverings of the lung and heart. (T. 434-435). Due to the body's advanced stage of decomposition, Dr. Zaki could not determine the time of death, but did state the victim had been dead at least three days. (T. 443). The cause of death was asphyxiation due to neck trauma, probably strangulation, according to Dr. Zaki. (T. 435).

The State's main witness and Petitioner's girlfriend, Linda Cook, testified that she had known both Petitioner and

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1/ "R" indicates record in trial court. "T" indicates trial transcript.

the victim. (T. 349-350). Ms. Cook stated that on April 13, 1979, Petitioner led her to the railroad tracks where she saw the body of Dewey Baugus lying on his stomach. (T. 351-352). Ms. Cook noticed that Petitioner had blood on his pants. (T. 350). Petitioner told her that he had killed Baugus. (T. 352). Petitioner then turned the boy's body over and proceeded to jump on the victim's neck. (T. 352). He told Ms. Cook that he had to make sure that Baugus was dead. (T. 352). He then threw the body into some bushes. (T. 352). Ms. Cook further testified that Petitioner said he had choked and beaten the victim with a stick. (T. 380).

Petitioner's stepfather, Enzor Lowe, testified that both Ms. Cook and Petitioner told him that Petitioner had killed a boy. (T. 387, 390). Lowe further stated that Petitioner had been grinning when he admitted the killing and that he (Lowe) did not believe Petitioner. (T. 390).

Glenda Wilborn, the victim's mother, stated that she had last seen her son the evening of April 11th when he left home with a playmate. (T. 469). On April 12th, Linda Cook came to stay with Ms. Wilborn, but the Petitioner came by later that day to get Ms. Cook. (T. 471-472).

After police was informed by Ms. Cook that Petitioner had thrown his bloodied pants behind his Primrose Circle apartment, Detective Guy Lloyd found a pair of stained pants in the area described by Ms. Cook. (T. 355, 401-402, 403).

An examination of the pants by a forensic serologist revealed that the stain was blood of human origin. (T. 464-465).

Following the State's evidence, the defense rested its case without presenting any witnesses or evidence. (T. 496).

In the sentencing phase, the State introduced copies of an indictment plea and sentence of the Petitioner to child molestation. (R. 557, 588, 589, 590) and introduced copies of an accusation plea and sentence of the Petitioner to the charge of aggravated assault with intent to rape. (T. 558, 591, 592, 593, 594).

The Supreme Court of Georgia affirmed the Petitioner's conviction and sentence on April 23, 1980. Thereafter, the Petitioner filed an Application for Writ of Certiorari. This Court remanded the case to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). Thereafter the Supreme Court of Georgia issued an addendum to its decision which is reported as Thomas v. State, 247 Ga. 233 (1981) decided March 3, 1981.

Thereafter the Petitioner filed the instant petition for writ of certiorari.

PART III

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. §27-2534.1(b)(7), IN LIGHT OF GODFREY v. GEORGIA, 446 U.S. 420, 100 S.Ct. 1759 (1980).

The Petitioner asserts that this Court should grant certiorari to consider whether the Georgia Supreme Court construed or applied Ga. Code Ann. §27-2534.1(b)(7) in an unconstitutional manner. The Petitioner alleges that the Georgia Supreme Court employed such a broad and vague construction of the words "torture" and "depravity of mind" in upholding the Petitioner's death sentence as to violate the Eighth and Fourteenth Amendments to the Constitution.

Godfrey v. Georgia, supra, specifically dealt with the application of Ga. Code Ann. §27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon a partial finding under (b)(7) that the murder of the victim had been outrageously or wantonly vile, horrible and inhuman. This Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. Godfrey, id., at page 1765. In the instant case, however, relating to the (b)(7) aggravating circumstance, the jury found the following aggravating circumstance, ". . . that choking and strangling of a 9 year child causing axphyxiation by the defendant was outrageously + wantonly vile, horrible and inhuman in that it involved torture and depravity of mind, . . .". (R. 118, 119). As opposed to Godfrey, the wording of the jury's

finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, revealed sufficient evidence to support the jury's finding that the victim suffered from torture, and that the Petitioner had demonstrated his depravity of mind beyond all reasonable doubt.

The Petitioner admitted to the State's witness Ms. Cook that the Petitioner told her that he had choked and beaten the victim with a stick. (T. 380). The medical evidence showed the cause of death as asphyxiation due to neck trauma, probably strangulation, of a nine year old child who weighed less than sixty pounds. (T. 432). Such evidence would clearly support a finding by a rational trier of fact of serious physical abuse prior to death. Along with this was evidence which would authorize a finding of serious sexual abuse to the victim which would also constitute serious physical abuse. It is also apparent that a defendant who tortures the victim or subjects the victim to an aggravated battery before the killing can be found by a rational trier of fact to have a depraved mind. See Hance v. State, 245 Ga. 856 (268 S.E.2d 339) (1980).

In Gregg v. Georgia, 428 U.S. 153, 201 (1976) the plurality opinion addressed the issue of whether Ga. Code Ann. §27-2534.1 (b)(7) was overly broad and vague. This Court acknowledges that an open-ended construction need not be applied by the Georgia Supreme Court to the language of the statute, and thus, the constitutional validity of that code section was upheld. Here, the Georgia Supreme Court engaged in a detailed examination of the facts in this case as applied to the (b)(7) aggravating circumstance found by the jury. In reality, since this Court's

decision in Godfrey, the Supreme Court of Georgia has taken even greater pains to make its appellate review an elaborate and detailed process to insure against the imposition of a disproportionate or arbitrary death penalty. See, e.g. Hance v. State, supra; Cape v. State, 246 Ga. 520 ___ S.E.2d ____ (1980); Green v. State, 246 Ga. 598 ___ S.E.2d ___ (1980). Thus, the Georgia Supreme Court has met the mandates as set out by this Court in Gregg, supra, and Godfrey, supra.

Therefore, the Petitioner's allegations in this regard are without merit.

B. THE SUPREME COURT OF GEORGIA EMPLOYED THE PROPER PROCEDURE ON REMAND FROM THIS COURT AND PROPERLY REAFFIRMED THE PETITIONER'S DEATH SENTENCE IN LIGHT OF GODFREY v. GEORGIA, 446 U.S. 420, 100 S.CT. 1759 (1980).

The Petitioner in substance complains that the decision of the Georgia Supreme Court on remand was improper because the jury did not have the benefit of the decision by this Court in Godfrey v. Georgia, supra, and limiting instructions thereunder.

In the main, a key distinction in the instant case and in the case of Godfrey is the actual aggravating circumstance found by the jury. In Godfrey, the jury found only that the offense of murder was outrageously or wantonly vile, horrible or inhuman. Godfrey, sppra , at 1764. In the instant case there was a specific finding by the jury that this killing involved torture and depravity of mind. (R. 118-119). This finding by the jury of torture and depravity of mind in a specific verdict shows restraint of the arbitrary and capracious infliction of the death penalty.

The Petitioner further asserts in substance that the decision by the Supreme Court of Georgia on remand amounts to speculation that the jury had a constitutional rather than an unconstitutional basis for its decision. However, it is apparent that the Supreme Court of Georgia on remand considered the Petitioner's case as it was tried and as the issues were determined in the trial court. Cole v. Arkansas, 333 U.S. 196, 201 (1948). There was no speculation by the Georgia Supreme Court as to the basis of the jury's finding. The court performed its statutory duty and determined that the evidence supported the finding of the aggravating circumstance. The Respondent submits that the

Supreme Court of Georgia acted within its statutory authority and properly reaffirmed Petitioner's death sentence without ordering a new jury trial on sentencing.

The Petitioner further complains in substance that the Supreme Court of Georgia's failure to provide briefs or oral arguments upon remand from this Court allegedly violated the Petitioner's Sixth, Eighth and Fourteenth Amendments rights.

It is apparent however that the Petitioner's case was not remanded to the trial court, but to the Georgia Supreme Court. Clearly, the filing of additional briefs and having additional oral argument would be within the discretion of that court.

The review conducted by the Georgia Supreme Court was not a resentencing proceeding, but a more detailed review of the death penalty as imposed by the trial court. In essence the Georgia Supreme Court merely reconsidered its own judgment in light of the Godfrey decision by this Court. The Petitioner had the automatic review provided by the Georgia statute and had the opportunity to file briefs and have oral argument prior to any decision being made by the Georgia Supreme Court. There was no deprivation of a right to a hearing by the Georgia Supreme Court's consideration on remand, as the Petitioner had previously had a hearing before that court and had the opportunity to argue concerning the sentencing of the Petitioner. No new evidence existed on remand and no new laws has been enacted for the Court to consider. The Petitioner likens the actions of the Supreme Court of Georgia to those of a sentencing authority, but as pointed out by the Petitioner, the court has no authority to impose the death sentence. The Georgia Supreme Court merely reaffirmed the sentence previously imposed. Questions of briefs and arguments and when additional briefs may be filed are clearly within the province of the rules of the Supreme Court of Georgia and do not rise to the level of a constitutional question under the facts of this case.

Therefore, the Petitioner's complaints in this regard are without merit.

C. THE TRIAL COURT WAS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE THE PETITIONER WITH AN EVIDENTIARY HEARING ON THE ISSUE OF COMPETENCY TO STAND TRIAL UNDER THE CIRCUMSTANCES OF THE INSTANT CASE.

In the instant case, three psychiatric evaluations of the Petitioner were performed by Order of the trial court. The first evaluation was reported to the trial court in the letter of Lloyd T. Baccus, M.D., dated June 4, 1979, which in substance indicated that the Petitioner was at that time, incompetent to stand trial. (See Appendix to Petition, pp. 9a, 10a). The second evaluation was done by Sheldon B. Cohen, M.D., and was reported to the trial court by letter on August 8, 1979. (See Appendix to Petition, pp. 11a, 12a). The report, in substance, could not reach a definitive diagnosis as to the Petitioner's competence to stand trial. Dr. Cohen's report noted there was a conflict between the information gathered in his observation of the Petitioner and the prior evaluation and speculated that this may have been caused by the effect of a prescribed tranquilizer, or " . . . that he may have simulated more in the previous interview than he did today." Dr. Cohen then recommended extended observation at Central State Hospital to clarify these factors.

The Petitioner had filed on June 25, 1980, a Special Plea of Incompetency to Stand Trial and a Motion for Transfer of Defendant to The Department of Human Resources. (R. 8). On August 10, 1979 the trial court issued an Order transferring the Petitioner to the Department of Human Resources. (R. 13).

On September 24, 1979, Jose M. Delatorre, M.D., reported to the trial court by letter in substance that based on the examination and evaluation conducted at Central State Hospital, that the Petitioner was competent to stand trial. (R. 16)

The Petitioner then went to trial on a general plea of not guilty on October 22, 1979. (T. 17).

It is apparent from the evidence before the trial court both prior and during the trial in the instant case that the quantum of evidence necessary to trigger a competency proceeding requiring an evidentiary hearing was not reached.

The general considerations in measuring this quantum of evidence necessary to trigger a competency procedure requiring an evidentiary hearing are (1) A history of irrational behavior; (2) the Defendant's demeanor at trial, (3) along with prior medical opinion. Chenault v. Stynchcombe, 546 F.2d 1191 (5th Cir. 1977), cert. denied 434 U.S. 878.

The resolution of this issue by necessity requires an individualized analysis. Jackson v. Caldwell, 461 F.2d 682 (5th Cir. 1972), cert. denied 409 U.S. 991 (1973). The Fifth Circuit Court of Appeals has noted in the case of Grissom v. Wainwright, 494 F.2d 30 (5th Cir. 1974) that extensive hearings and thorough psychiatric examinations are not vital prerequisites to the prosecution of every criminal case. Indeed, low intelligence or weird behavior cannot be equated with mental incompetency to stand trial. McCune v. Estelle, 434 F.2d 611 (5th Cir 1976).

Comparing the instant case with analgous proceedings under 18 U.S.C.A. 4244, it is clear that where a trial court had ordered a psychiatric evaluation and report, and that report indicated that the defendant was competent to stand trial, that no evidentiary hearing would be required. United States v. Greier, 521 F.2d 597 (5th Cir. 1975). As such, the trial court in the instant case took appropriate affirmative steps to examine the competency of the

Petitioner within the constitutional parameters as set out in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975). It can be seen from the report dated September 24, 1979 from Dr. Delatorre of Central State Hospital that there was insufficient evidence before the trial court to raise a bona fide and reasonable doubt as to the defendant's competency to be tried at the given point in time. (R. 16).

Therefore, the trial court was not required to hold an evidentiary hearing on the issue of the competency of the Petitioner to stand trial and as such, none of the Petitioner's constitutional rights have been violated in this regard.

D. THE JURY WAS PROPERLY SELECTED UNDER THE PRINCIPLES OF WITHERSPOON v. ILLINOIS.

The Petitioner has complained of alleged violations of the rule of this Court as determined in the case of Witherspoon v. Illinois, 391 U.S. 510 (1968). These complaints center around the striking for cause of the perspective jurors, Frances Ogletree, Joyce Beachum, Eddie Watkins, Christine Reese and Evelyn Thompson.

This Court has made it clear that a state may constitutionally exclude veniremen from a jury who make it unmistakably clear, (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, supra, page 522-523 n.21. This Court has further indicated in the case of Adams v. Texas, ___ U.S. ___ 100 S.Ct. 2 1 (1980) that a state is entitled under the Witherspoon rule to exclude jurors who are clearly not willing to consider all the penalties provided by law and would not be able to follow the instructions provided by the trial court.

It is therefore apparent from a review of the responses contained in the testimony of these prospective jurors that each was properly excused under the principles of Witherspoon v. Illinois.

Therefore, the Petitioner's allegations in this regard are without regard.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner.

Respectfully submitted,

PLEASE SERVE:

W. DAVIS HEWITT
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
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W. DAVIS HEWITT
Assistant Attorney General